IN THE

SUPREME COURT OF THE UNITED STATES.

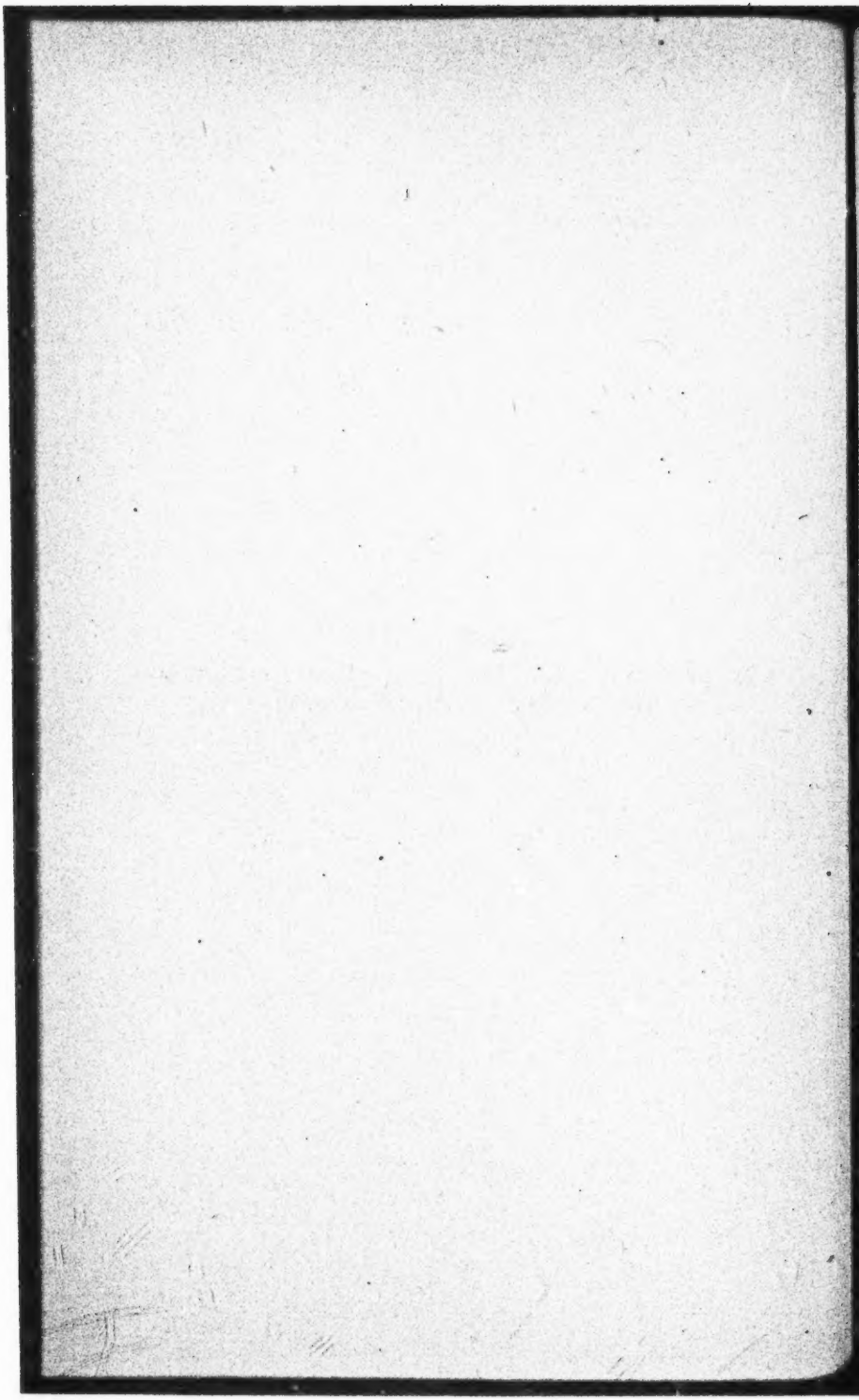
THE UNITED STATES OF AMERICA EX REL. THE CHAMPION LUMBER COMPANY, A CORPORATION, PETITIONER,

vs.

WALTER L. FISHER, SECRETARY OF THE INTERIOR, AND FRED DENNETT, COMMISSIONER OF THE GENERAL LAND OFFICE, RESPONDENTS.

PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PATRICK H. LOUGHRAN,
Barrister Building, Washington, D. C.,
Attorney for the Petitioner.



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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Champion Lumber Company, a corporation, by its counsel, respectfully hereby represents:

I.

That on or about December 13, 1912, a petition for writ of error to the Court of Appeals of the District of Columbia to review, under section 250 of the Judicial Code, that court's decision in the above-entitled case (40 Washington Law Reporter, 780), was presented to the Honorable Chief Justice of the Supreme Court of the United States. The said petition was returned to counsel for petitioner, leave being granted him by the Chief Justice to submit the petition in open court with printed brief in support thereof, after rea-

sonable notice to counsel for respondents. As shown by acknowledgment of service appended hereto, counsel for respondents were notified on January 10, 1913, that on the 27th day of January, 1913, or as soon thereafter as petitioner's counsel can be heard, petition for the writ, and brief in behalf of it, would be presented. The petition and the brief in support of it (thirty copies) are presented herewith under the same cover, and are accompanied with nine copies of the transcript of the record in the Court of Appeals of the District of Columbia.

II.

The proceedings in the cause and a statement of the questions raised and adjudicated in the courts below are stated, on behalf of the petitioner, as follows:

On April 26, 1910, it filed in the Supreme Court of the District of Columbia a petition for writ of mandamus to compel the Secretary of the Interior and the Commissioner of the General Land Office to cause to have issued a patent for certain public lands of the United States, situate in the State of Mississippi, which had been finally entered under the homestead laws by one Lucy Johns, from whom, through intermediate conveyances, the equitable title under such final entry had vested in your petitioner (Record, pp. 1 to 5).

The writ was prayed for upon the alleged ground that—

> "the jurisdiction of the respondents to do anything concerning said entry except to issue patent thereunder is terminated, and that no executive department of the government has any further jurisdiction over the land covered by said entry except to issue patent thereunder" (Record, p. 5);

and that the ruling of the respondents in their official capacities that such entry was protested within two years from September 24, 1902, was an arbitrary and capricious ruling made in furtherance of an attempt to revive and continue a jurisdiction and power that had been lost, and to give color

of warrant for their refusal to perform and discharge a positive duty to the petitioner under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), which reads as follows:

> "*Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the *homestead, timber-culture, desert-land, or pre-emption laws, or under this act*, and when there shall be no pending contest *or protest* against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

In the petition for writ of mandamus it was alleged, *inter alia* (Record, p. 5)—

> "*that the acts of the respondents in refusing to issue patent upon the Lucy Johns entry are arbitrary and without authority of law;* * * * that by reason of the terms of the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095) * * * the jurisdiction of the respondents, to do anything concerning said entry except to issue patent thereunder is terminated, *and that no executive department of the Government has any further jurisdiction over the land covered by said entry except to issue patent thereunder;* * * * your petitioner is deprived of the benefit of showing that title to said lands has become vested in it and is injured thereby."

The respondents' joint answer contains, *inter alia*, the following:

> "Respondents deny that their acts in refusing to issue patent upon the entry of Lucy Johns are arbitrary and without the authority of law, and deny that said entry was neither protested nor contested within two years from September 24, 1902, on which date the receiver's final receipt was issued, and deny that by reason of the terms of the proviso to section seven

> of the said act of March 3, 1891, the jurisdiction of the Land Department to do anything concerning said entry, except to issue patent, is terminated" (Record, p. 9).
>
> * * * * * * *
>
> "Respondents finally suggest that this proceeding, wherein it is sought that they be directed to issue a patent to a tract of public land, is virtually and in effect an attempt to invest this court with appellate jurisdiction to try anew or review the solemn decisions of the Land Department of the Government upon questions committed by law to its exclusive control" (Record, p. 10).

The case was submitted to the Supreme Court of the District of Columbia on an agreed statement of facts (Record, pp. 14 to 20). That court, by Justice Anderson, who had ordered issuance of a writ of mandamus in the case cited below, dismissed the petition, expressly founding its action in so doing upon the decision of the Court of Appeals of the District of Columbia in Fisher *vs.* United States *ex rel.* Grand Rapids Timber Company (37 App. D. C., 436), which decision reversed the judgment of the Supreme Court of the District of Columbia in that case (Record, pp. 21 and 22).

An appeal was prosecuted to the Court of Appeals of the District of Columbia, fifteen specifications of error appearing in the assignment (Record, pp. 23 to 27). That court, on the 4th of November, 1912, affirmed the Supreme Court of the District of Columbia, saying, in part (40 Washington Law Reporter, 780):

> "Every point advanced by appellant in this case is, in our view, settled by the following very recent decisions: Fisher *vs.* Grand Rapids Timber Co., 37 App. D. C., 436; Ness *vs.* Fisher, 223 U. S., 683; McKenzie *vs.* Fisher, 39 App. D. C., 7. In Fisher *vs.* Grand Rapids Timber Co., which involved the interpretation of the very statute upon which appellant here relies, this court, speaking through Mr. Justice Van Orsdel, said: 'While it is true that arbitrary

power resides nowhere in our system of government, and while the supervisory authority vested in the Secretary of the Interior and the Commissioner of the General Land Office over the disposition of the public lands is neither unlimited nor arbitrary, yet the question here presented as to whether or not the communication and order amounted to a protest, which we regard as exceedingly close, was one clearly within the power of the Commissioner to decide. To say that he was mistaken would require us to review a matter exclusively confided to his discretion and judgment. This proceeding will not admit of such a review.'

"The communications of Special Agent Hammer respecting this entry were made within the two years contemplated by said act of March 3, 1891, as was the communication of June 18, 1904, from the Commissioner to said agent. It is apparent that these communications resulted in the withholding of a patent; in other words, that the Commissioner regarded the right to that patent as dependent upon the outcome of the investigation which was to ensue. *The subsequent decision of the Secretary that what was done within the two-year period constituted a protest against the patenting of the entry was not arbitrary or capricious, but was based upon evidence, and the sufficiency of that evidence was for his and not our determination.*"

Thereafter the petitioner made application to the Court of Appeals of the District of Columbia for removal of the cause to the Supreme Court of the United States under the 5th paragraph of section 250 of the Judicial Code. On the 19th of November, 1912, such application was denied by the said Court of Appeals.

ARGUMENT.

The purpose of the following very brief argument is to show that the pleadings in the case brought before the courts below, as a subject of direct inquiry, the question whether the respondents, or either of them, at the termination of two years from September 24, 1902, had any jurisdiction, authority, power or duty with respect to the Lucy Johns entry and the land affected thereby other than such jurisdiction, authority, power and duty as would be exercised or involved in the performance of the purely ministerial act of issuing patent. If we show this, then we will have shown the case to be of that character of cases reviewable by the Supreme Court of the United States under writ of error in pursuance of section 250 of the Judicial Code, which reads, in pertinent part, as follows:

> "SEC. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:
>
> * * * * * * *
>
> "Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question."

The petition for mandamus alleged that the—

> "jurisdiction of the respondents to do anything concerning said entry except to issue patent thereunder is terminated" (Record, p. 5).

That allegation was a denial of the existence of any power in either of the respondents to do aught else than to issue patent. That allegation, considered in connection with other allegations appearing in the petition (Record, p. 5), charged that a duty rested upon the respondents to issue patent and

that their refusal to do so would effectually deprive the petitioner of an accrued and vested right under the proviso to section 7 of the act of March 3, 1891, *supra*, unless mandamus was granted as prayed.

The answer of the respondents denied that—

> "the jurisdiction of the land department to do anything concerning said entry, except to issue patent, is terminated" (Record, p. 9).

The answer also denied the petitioner's allegation that the respondents'—

> "acts in refusing to issue patent upon entry of Lucy Johns are arbitrary and without the authority of law" (Record, p. 9).

It is alleged in the answer that the respondents have always had full and unimpaired jurisdiction of the said entry for all purposes, and in proof of that averment they say that they, themselves, have declared that they never at any time lost such jurisdiction and that any declaration to that effect by them is a—

> *"solemn decision (s) of the land department of the government upon questions committed by law to its exclusive control"* (Record, p. 10),

and, under no circumstances, subject to inquiry by the courts. In other words, the answer averred (in denial of the allegation in the petition) that there was plenary jurisdiction or power over the entry in the respondents because they, themselves, had solemnly ruled (arbitrarily and capriciously as alleged by the petitioner) that the said entry had been protested within the two-year period and that their solemn ruling to that effect, although alleged by the petitioner to be as illogical, indefensible, groundless, absurd, arbitrary and capricious as a ruling that black is white or that two and two total seventeen, was such a ruling or conclusion on a matter of law that lies beyond the possibility of

It is respectfully submitted that the petitioner seems clearly entitled to have the judgment of the court below reviewed by the Supreme Court of the United States under section 250 of the Judicial Code.

If it was the intention of Congress to deny *the right* of review by the Supreme Court of the United States, *under writ of error, to litigants* in cases presenting issues of the character of those made in the present case, certainly it was never the intention of the lawmaking body wholly to deprive that court of all jurisdiction with respect to such cases, for by the terms of section 251 of the Judicial Code the court is given jurisdiction—

> "in *any* case in which the judgment or decree of said Court of Appeals is made final by the section last preceding * * * to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court."

Therefore, it would seem that the Supreme Court would have jurisdiction in a case of this character to review and determine by certiorari, if in its judgment it would be proper to do so, if there existed no right in the litigants to invoke review by writ of error. Whether review in a case of this character is a matter of right by way of writ of error or a matter resting in the discretion of the court to be exercised in action on a petition for certiorari will, therefore, it is believed, be determined by the court in its opinion upon the merits of the present petition for writ of error. Determination of that question by the court should be not less desired by the Government than by other parties to proceedings in which the acts of Government officers are drawn in question.

Respectfully submitted.

THE CHAMPION LUMBER COMPANY, *a Corporation,*
By PATRICK H. LOUGHRAN,
Its Counsel.

DISTRICT OF COLUMBIA, ss:

Patrick H. Loughran, being first duly sworn, makes oath that he prepared and has read the foregoing petition and knows the contents thereof, and that he subscribed same as counsel for the Champion Lumber Company, a corporation, the petitioner; that the statements of facts therein made, as upon personal knowledge, are true, and that those statements of facts made upon information and belief he believes to be true.

PATRICK H. LOUGHRAN.

Subscribed and sworn to before me this 9th day of January, 1913.

[SEAL.] EMILY F. CAMP,
Notary Public.

To Hon. George W. Wickersham, Attorney General of the United States, and Charles W. Cobb, Esq., Assistant Attorney General for the Department of the Interior:

You are respectfully hereby notified that I will, on the 27th day of January, 1913, immediately after the opening of the court on that date, or as soon thereafter as may be convenient for the court to hear me, present to the Supreme Court of the United States the foregoing petition and brief for a writ of error to the Court of Appeals of the District of Columbia, to have reviewed the judgment of that court in United States *ex rel.* The Champion Lumber Company *vs.* Walter L. Fisher, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office (40 Washington Law Reporter, 780).

I beg leave to suggest that all intended opposition to the petition be made in a brief to be submitted at the time of presenting the petition, right of reply to any opposition being hereby waived.

PATRICK H. LOUGHRAN,
Attorney for Champion Lumber Company,
a Corporation, Petitioner.

Receipt of a true and complete copy of the foregoing notice, petition, and brief on this 10th day of January, 1913, is hereby acknowledged by each of the undersigned.

WM. MARSHALL BULLITT,
Solicitor General.
CHARLES W. COBB,
Assistant Attorney General.

[19849]

In the Supreme Court of the United States.

OCTOBER TERM 1912. No. —.

THE UNITED STATES OF AMERICA EX REL. THE Champion Lumber Company,

Petitioner,

v.

WALTER L. FISHER, SECRETARY OF THE INTERIOR, and Fred Dennett, Commissioner of the General Land Office,

Respondents.

ON PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION.

ARGUMENT FOR RESPONDENTS.

Petitioner seeks the removal of the above-entitled cause to this court on writ of error to the Court of Appeals of the District of Columbia under the provisions of the fifth paragraph of section 250 of the Judicial Code, act of March 3, 1911 (36 Stat. 1087, 1159).

This section applies solely to the Court of Appeals of the District of Columbia. The fifth paragraph of the section reads as follows:

> In cases in which the validity of any authority exercised under the United States or the existence or scope of any power or duty of an officer of the United States is drawn in question.

The case was commenced by petitioner in the Supreme Court of the District of Columbia by filing a petition for mandamus. The defendants are the Secretary of the Interior and the Commissioner of the General Land Office. The petition prayed that the court interfere with and coerce the judgment and discretion of defendants, and that they be directed and compelled to issue to petitioner a patent for certain lands the title to which was in the United States, and the proceedings to acquire which were still *in fieri*. That court, upon the facts in the case, following prior decisions of the Court of Appeals of the District of Columbia, held that mandamus did not afford such relief. The principles relied upon by those courts have since been definitely announced by this court in the late case of *United States* ex rel. *Ness* v. *Fisher*, 223 U. S. 683.

Let us see what the facts are as disclosed by the record.

It appears from the pleadings that one Lucy Johns, on September 17, 1897, made a homestead entry of 80 acres of public lands of the United States (R. 2); on September 16, 1902, she made final proof, and,

on September 24, 1902, the register of the local land office issued to her final certificate, and on the same day the receiver issued his final receipt. (R. 2.) Thereafter, Johns transferred her interest in the land to the petitioner. (R. 2.)

More than two years after the issuance of the receiver's receipt the Commissioner of the General Land Office directed that a hearing he had on charges of fraud against said entry. (R., 3, 20.)

Thereafter, petitioner moved the Commissioner of the General Land Office for a stay of proceedings under said order for a hearing, on the ground that the entry should be patented without further proceedings by virtue of the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095), for the reason that no protest or contest against the entry was pending at the expiration of two years from the issuance of the receiver's final receipt. That proviso reads as follows:

> *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, *and when there shall be no pending contest or protest against the validity of such entry*, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

That motion was denied in due course. Petitioner appealed to the Secretary of the Interior, and the latter affirmed the judgment of the Commissioner of the General Land Office; then this suit was instituted in the Supreme Court of the District of Columbia to compel the defendants to issue patent. (R., 5, 20.)

Now, it must be seen at once that the existence or scope of the power or duty of the Secretary of the Interior is not drawn in question in this case. It is admitted to its fullest extent the exercise of that power and duty was invoked by petitioner, and the utmost that he claims is that, within the scope of that power and duty, the Secretary erred.

It will be seen from petitioner's complaint (R., 3, 4) and from the stipulation of facts (R., 17–20) that petitioner points out the proceedings which were had against the entry in the Land Department within two years after the issuance of the receiver's receipt, and contends, simply, that those proceedings were not sufficient to constitute a "protest" or "contest" within the meaning of the said act of March 3, 1891, *supra*.

Petitioner in his brief herein (p. 3) quotes a portion of his complaint in an attempt to show that it drew in question the existence or scope of the power or duty of the Secretary. The quotation fails to show it, but by adding the portions left out in the quotation it conclusively shows to the contrary. After reciting in the complaint certain proceedings which had been taken against the entry within the

two-year period (R., 2–5), petitioner alleges in paragraph 10 (R., 5):

> Your petitioner represents that the acts of the respondents in refusing to issue patent upon the Lucy Johns entry are arbitrary and without authority of law; that said entry should, under the facts recited herein, be patented, *for the reason that said entry was neither protested nor contested within two years from September 24, 1902, on which date the receiver's final receipt was issued;* that by reason of the terms of the proviso to section 7 of the act of March 3, 1891, hereinbefore referred to, the jurisdiction of the respondents to do anything concerning said entry except to issue patent thereunder is terminated, and that no executive department of the Government has any further jurisdiction over the land covered by said entry except to issue patent thereunder. The said proviso reads:
>
> "That after the lapse of two years from the date of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land, or preemption laws, or under this act, *and when there shall be no pending contest or protest against the validity of said entry,* the entryman shall be entitled to a patent."

The issue thus raised by petitioner was not the lack of power in the Secretary nor the scope thereof. He says that the entry should be patented. Why? "*For the reason that said entry was neither protested nor contested within two years from September 24, 1902, on which date the receiver's final receipt was*

issued." And, claiming that the proceedings taken by the Land Department did not constitute a "protest," he states his legal conclusion that "the acts of the respondent in refusing to issue patent on the Lucy Johns entry are arbitrary and without authority of law."

He says in his complaint that, "by reason of the terms of the proviso to section 7 of the act of March 3, 1891, hereinbefore referred to, the jurisdiction of the respondents to do anything concerning said entry, except to issue patent thereunder, is terminated, and that no executive department of the Government has any further jurisdiction over the land covered by said entry except to issue patent thereunder." And then he quotes the proviso.

That is to say, the jurisdiction of the respondents to do anything "* * * except to issue patent * * * terminated," because and "for the reason that said entry was neither protested nor contested within two years," etc.

In other words, he claims that this proviso is a statute of limitations—that no objection to the entry can be made after two years from the issuance of the receiver's receipt, *if no protest is then pending.* So, when he was called upon to meet the charges of fraud against the entry, instead of meeting them on the merits he admitted the fraud, but asked that the proceedings be stayed, because at the end of the two-year period there was no protest or contest pending, and that, consequently, the statute of limitations (proviso aforesaid) had run against the

right to initiate any proceedings against the entry. He wanted a patent to the land; he had to get that patent from the Land Department; the Land Department was about to proceed against the entry; he comes in and says there is no doubt about the existence of the power and duty of the Secretary of the Interior to cancel this entry on the ground of fraud, provided, within two years from the issuance of the receiver's receipt, a protest or contest against it had been initiated. He contended, however, that there had been no such contest or protest and that, consequently, by virtue of the statute, he was entitled to a patent, and he asked the Secretary to decide that there had not been a contest or protest. He thus admitted the existence or scope of the power and duty of the Secretary and invoked the exercise of that power and duty to its fullest extent. Somebody had to decide whether there had been a contest or protest initiated within the two years, and he very properly recognized that the proper and only person to do that was the Secretary.

He went to trial before the Land Department on his motion to stay the proceedings. After all of the facts had been introduced and he had been heard, the Secretary of the Interior decided that there had been a protest, and that at the termination of two years from the date of the receiver's receipt there was a "pending contest or protest against the validity of said entry." This was the determination of a question of fact within the scope of an existing power

and duty of the Secretary, presented to him by petitioner for decision.

He never claimed that the Secretary had naught to do but issue him a patent; he simply claimed that he was entitled to a patent because there had been no contest or protest within the two years. The Secretary conceded his contentions and sat with him to determine the fact; and did determine it.

And he says in his complaint the said entry should "under the facts recited herein be patented"—for the reason that those facts did not constitute a protest or contest. That is all there was to it. He stated to the court that the Secretary committed error in deciding, as an ultimate fact, that the things and facts which he had called attention to constituted a protest—and the Secretary, of course, had the power to decide it.

So it is with the return to the rule (R., 6–10), for there the Secretary replied that his action in refusing to issue patent was not arbitrary and capricious, because certain things therein referred to by the Secretary "constituted a protest within the meaning of the proviso to the seventh section of the said act of March 3, 1891," and the Secretary in the return points out the facts which he claims constituted a protest within the two years.

So, also, in the agreed statement of facts (R., 14–20), all of the things are set out which it is contended on the one hand by petitioner did not constitute a protest, and on the other hand by the Secretary that did constitute a protest; "the fore-

going agreed statement is a true and full statement of all the facts within the knowledge of the petitioner, as ground for action, and within the knowledge of respondents, as ground of defense" (R., 20). And it is therein agreed that the decision of the Commissioner of the General Land Office and the Secretary of the Interior were based upon a "finding upon the facts herein set forth that a protest had been filed against the patenting of Lucy Johns's homestead entry within two years from the date of the issuance of the receiver's receipt upon the final entry of this tract," and that they thereupon held that the case should proceed to a hearing on the charges of fraud. (R., 20.)

It will be seen that there was no issue in the case at all as to the existence or scope of the power and duty of the Secretary. The whole issue was, as made by the pleadings and by the statement of facts, Was there, as a matter of fact, a contest or protest initiated against the entry within the two years?

As to this, the Court of Appeals held, following former cases of its own and *United States* ex rel. *Ness* v. *Fisher*, 223 U. S., 683, that the decision of this question by the Secretary was one which could not be reviewed by the court in mandamus.

Petitioner in his brief on this petition says (pp. 8–9):

> The respondents, knowing and practically admitting that the said act of Congress imposed a mandatory duty upon them to issue patent under *certain conditions*, could not have made a defense to the petiton *except by deny-*

> *ing the petitioner's allegations that the entry* had been "neither protested nor contested within two years from September 24, 1902."

It would seem that this statement settles the case. Let us admit for the purpose of argument that the said act of Congress imposes a mandatory duty on the Secretary to issue patent "under certain conditions" and that there would have been no defense to petitioner's suit except by denying petitioner's allegation that the entry had been "neither protested nor contested within two years from September 24, 1902." But petitioner did so allege and respondents did so deny. And it was this allegation and this denial which raised the only issue in the case. Petitioner's complaint would not have stated a cause of action if he had not alleged that no protest or contest had been initiated within the two years. This is the basis of his whole proceeding, for the statute says that the entryman shall be entitled to a patent "when there shall be no pending contest or protest against the validity of such entry" within the two years.

Again, petitioner says (brief, p. 9):

> Respondents knew, and practically admitted, that the said act of Congress deprived them of all jurisdiction and power (except to issue patent) over certain final entries *which are neither protested nor contested within two years from the making thereof.*

Again, he admits that the jurisdiction and power only ceases where there has been no protest or con-

test, and as to this he says there was no contest or protest—and there was the issue.

Further quoting from his brief:

> If a statute limiting the "power or duty of an officer of the United States," by providing that such power or duty shall cease to exist upon certain contingencies, can be practically nullified and erased from the statute books by an arbitrary and capricious ruling by such officer, at any time, *to the effect that the contingency or contingencies have not arisen*, and that simply because he has so ruled his "power or duty" continues unimpaired, and the courts are powerless to afford relief from such "solemn decisions" or ruling, then, without doubt, we have wasted our time and the time of this court in seeking a writ or error. * * *

He again admits that it was within the scope of the power and duty of the Secretary of the Interior to decide, "to the effect that the contingency or contingencies have not arisen." That ends this petition. The question of whether the exercise of the power in this case was arbitrary or capricious—whether the judgment of the Secretary as to the facts was correct or not—is not a question now before the court.

Petitioner does not claim here that the question raised by him is that, under the proviso to the act of March 3, 1891, *supra*, the Land Department has no power, after the expiration of the two years, in any case, to do aught but issue a patent. Such a contention would not be in accordance with the record, as we have shown above, and, indeed, petitioner admits that the question as to whether, under the proviso,

the entryman is entitled to a patent can not be decided until after the expiration of the two years. Of course, that question can never be raised until after two years from the date of issuing the final receipt, and the question of whether a patent shall issue, under the provisions of the statute, must necessarily be decided by the Land Department, and that decision must rest upon a finding by it as to whether, at the expiration of the two years, there was a pending protest or contest against the entry. This is exactly the issue made by petitioner before the Land Department, and in his pleading in this case, he simply contending that the proceedings taken by the Land Department within the two years did not amount to a protest or contest.

The learned justice of the Supreme Court of the District of Columbia, who heard the case originally, did not misunderstand the issue. He says (R., 21):

> * * * a petition for mandamus was filed herein to require the respondents to issue a patent * * * respondents filed their return which alleged that there was a pending protest against the validity of the entry within the two-year period * * * relator filed a replication denying that there was any pending contest or protest within the two-year period. To this a joinder in issue was filed. * * * The question thus presented to the court for decision is whether, notwithstanding the ruling of the Secretary of the Interior that the facts stated showed a protest to have been pending during the two-year period, such facts justified the ruling.

Neither did the Court of Appeals of the District of Columbia, after hearing and giving consideration to the pleadings and petitioner's argument, have any difficulty in finding what the issue was. It says (petitioner's brief, p. 5):

> * * * The question here presented as to whether or not the communication and order amounted to a protest. * * *

Petitioner himself presented the issue very clearly in his assignments of error. In his brief he stated that he would rely especially upon those assignments of error numbered VII, VIII, IX, X, XII, XIV, XV, on appeal to the Court of Appeals of the District of Columbia. In those specifications (R., pp. 25–27) he simply points out and complains that the facts in the record showing the proceedings taken against the entry by the Land Department during the two-year period were not sufficient to constitute a protest.

> * * * the court erred in failing affirmatively to rule, under the admitted facts in the case at bar, that the said letter of June 18, 1904, was a notice to the special agent that the General Land Office would soon be required by reason of the proviso to section 7 of the act of March 3, 1891, to approve the Lucy Johns entry for patent *unless*, and "at once," the special agent should report against or protest that entry. (Specification VIII.)
>
> * * * the court erred in failing affirmatively to rule, under the admitted facts in the case at bar, that the letter of June 24, 1904, * * * *was not and could not have been a pro-*

test against the Johns entry, because (giving five reasons). (Specification IX.)

* * * the court erred in failing affirmatively to rule that the letter of the Commissioner of the General Land Office * * * was not, and could not have been a protest against the Johns entry, for the reason * * *. (Specification XI.)

* * * the court erred in failing affirmatively to rule, under the admitted facts in the case at bar, that the only case, pleading, paper, matter, or thing capable of constituting the basis "of a justiciable action" by the Land Department *in holding the Johns entry to have been protested was the report made on May 12, 1906,* * * * *long after the expiration of two years* from the date of the issuance of receiver's final receipt. (Specification XII.)

* * * the court erred in failing to rule that the question presented, under the pleadings, and under the agreed statement of facts in the case at bar, is wholly and entirely a question in law, *being simply a question whether the* "true and full statement of all the facts within the knowledge of petitioner, as ground for action, and within the knowledge of respondents, as ground of defense," *shows that at expiration of the statutory period there was pending in the Land Department* any case, pleading, paper, matter, or thing *to constitute a basis* for a justiciable action by the Land Department *holding the entry to have been protested at that time.* (Specification XIII.)

* * * the court erred in failing affirmatively to rule, under the admitted facts in the case at bar, that the Land Department had

> arbitrarily, and therefore necessarily without basis for justiciable action, rendered judgment that *the Lucy Johns entry had been protested within two years from date of final receiver's receipt thereon*, the agreed statement of the facts failing to show not only the want of a substantial evidence, but the want of a scintilla of evidence, *to sustain a ruling that the Lucy Johns entry was protested within the two-year period*. (Specification XV.)

We call attention in this respect to the balance of the specifications of error in the record, in each one of which the only point made is that there was no pending protest against the entry at the expiration of the two-year period.

And petitioner, in his brief, on these specifications of error in the court below, relieved the question of any doubt when he said:

> To insure against the possibility of any misunderstanding our position in this proceedings, we repeat that the sole question we urge upon the court for its decision is whether the Land Department exercised judicial discretion in a lawful manner *when it held that the Lucy Johns entry was protested within two years from date of issuance of the final receipt thereunder*.

The question here presented has had the consideration of the Court of Appeals of the District of Columbia in a number of cases involving the precise question in this case. That court held that the existence or scope of any power or duty of an officer of the United States was not drawn in question. In at least two

cases within the past two months applications were made to this court for a writ of error to the Court of Appeals of the District of Columbia, where the question involved was precisely the same as that here and where the application was made under the provisions of the same paragraph of the Judicial Code as here relied on. In those two cases the Chief Justice denied the applications. The cases referred to are *United States* ex rel. *Red River Lumber Company* v. *Walter L. Fisher, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office,* and *United States* ex rel. *MacManus* v. *Walter L. Fisher, Secretary of the Interior.*

Finally, it would seem that the main question and the real and final thing at issue in this case is whether a homestead entry shall be cancelled or a patent issue therefor. The question arising under the act of March 3, 1891, *supra,* was purely incidental. The whole thing involves the disposal of public lands, the title to which is still in the United States, the proceedings to acquire which are still *in fieri,* and no one, not even petitioner, doubts the existence of the power and duty of the Land Department, or the scope thereof, in that respect.

The application should be denied.

WM. MARSHALL BULLITT,
Solicitor General.

CHARLES W. COBB,
Assistant Attorney General.

JANUARY 20, 1913.

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UNITED STATES EX REL. CHAMPION LUMBER COMPANY *v.* FISHER, SECRETARY OF THE INTERIOR.

PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Submitted January 27, 1913.—Decided February 24, 1913.

Under subd. 5 of § 250 of the Judicial Code of 1911 a final judgment of the Court of Appeals of the District of Columbia can only be reviewed by this court in cases where the validity of any authority exercised under the United States, or the existence or scope of any power or duty of any officer of the United States, is drawn in question.

The meaning of the phrase "drawn in question" as it occurs in § 250 of the Judicial Code is the same as in § 709, Rev. Stat.; § 5 of the Circuit Court of Appeals Act, and other statutes regulating territorial appeals.

A statute of the United States authorising an officer to act in a certain manner under certain conditions is not drawn in question nor is the scope or validity of authority of the officer acting thereunder drawn in question, simply because there is a controversy as to whether the specified conditions do or do not exist.

Where the Secretary of the Interior refused to issue a patent because a protest was pending, the denial of a petition for a writ of mandamus

directed to him to issue the patent on the ground that there was no protest, does not draw in question the validity or scope of his authority but only the question of fact as to existence of a protest and there is no jurisdiction in this court under § 250 of the Judicial Code to review the judgment.

Writ of error to review 40 Wash. Law Reporter, 780, denied.

THE facts, which involve the construction of § 250 of the Judicial Code of 1911 and the jurisdiction of this court to review judgments of the Court of Appeals of the District of Columbia, are stated in the opinion.

Mr. Patrick H. Loughran for petitioner.

The Solicitor General and *Mr. Assistant Attorney General Cobb* in opposition.

MR. JUSTICE DAY delivered the opinion of the court

This is a petition for the allowance of a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court affirming the judgment of the Supreme Court of the District of Columbia, dismissing the petition of the Champion Lumber Company against the Secretary of the Interior and the Commissioner of the General Land Office.

It appears that on April 26, 1910, a petition was filed by the petitioner in the Supreme Court of the District of Columbia praying for a writ of mandamus against the Secretary of the Interior and the Commissioner of the General Land Office to issue a patent for the land hereinafter referred to. The grounds of the petition were that the Lumber Company was the owner of certain lands which had been finally entered under the homestead laws by one Lucy Johns, from whom the petitioner derived title; that the only authority left in the Land Department on the facts set forth was to issue a patent for the land,

and further that the ruling of the Secretary of the Interior and the Commissioner of the General Land Office that a protest, made within two years from the date of the issuance of the receiver's receipt, was pending, whereby the patent was withheld in accordance with the provisions of § 7 of the act of March 3, 1891 (26 Stat. 1095, 1098, c. 561), was an arbitrary and capricious ruling, made without legal authority. The respondents answered and denied the allegations of the petition in this respect, and averred the pendency of a protest which justified the holding up of the patent under the provisions of the statute. The case was tried upon an agreed statement of facts, of which the following is an abridgment:

On September 17, 1897, Lucy Johns made entry under the homestead laws at Jackson, Mississippi, of certain land subject to entry, the papers showing that she was qualified to make the entry, which showing has not been questioned; on September 24, 1902, she having made *prima facie* proof of compliance with the requirements of the homestead laws, final certificate and receipt were issued to her, and the proof was forwarded to the Commissioner of the General Land Office at Washington during October of that year. On January 15, 1903, she conveyed all her interest in the entry to the petitioner, which subsequently conveyed it to one Hines, who later conveyed it back to the petitioner. On November 19, 1902, a special agent of the General Land Office named Hammer wrote the Commissioner that he had reason to believe that ninety per cent. of the proofs in the territory where petitioner's land is situated were fraudulent, and that he had under investigation certain entries, including the one in question, and requested that all patents be withheld until a full report was made; on November 28, 1902, Hammer informed the Commissioner that the investigation so far made had disclosed flagrant frauds, and renewed his request to withhold patents to such lands, and on

December 13th of that year the Commissioner directed the register and receiver at Jackson to suspend action on commutations and proofs until Hammer had reported; and on June 24, 1904, Hammer, in response to a letter from the Commissioner inquiring as to the necessity of an investigation, replied in the affirmative. On May 12, 1906, another special agent reported that the entry of Lucy Johns "was made for speculative purposes, with no attempt to comply with the requirements of the law, and recommended that the entry be canceled on the ground of non-residence, non-cultivation, non-improvement and abandonment." Thereupon the Commissioner directed that a hearing be had. The petitioner moved for a stay of proceedings, claiming that under § 7, *supra*, the entry should be patented without further proceedings. The motion was denied by the Commissioner and this denial affirmed by the Secretary of the Interior, who later denied a motion to review his decision, finding that a protest had been filed against the patent of Lucy Johns' homestead entry within two years from the issuance of the receiver's receipt and holding that the case should proceed to hearing on the special agent's charge.

The Supreme Court of the District of Columbia dismissed the petition. Upon appeal to the Court of Appeals that court affirmed the judgment of the Supreme Court. 40 Washington Law Reporter, 780. In the course of the opinion the Court of Appeals said (p. 781):

"Every point advanced by appellant in this case is, in our view, settled by the following very recent decisions: *Fisher* v. *Grand Rapids Timber Co.*, 37 App. D. C. 436; *Ness* v. *Fisher*, 223 U. S. 683; *McKenzie* v. *Fisher*, 39 App. D. C. 7. In *Fisher* v. *Grand Rapids Timber Co.*, which involved the interpretation of the very statute upon which appellant here relies, this court, speaking through Mr. Justice Van Orsdel, said: 'While it is true that ar-

bitrary power resides nowhere in our system of government, and while the supervisory authority vested in the Secretary of the Interior and the Commissioner of the General Land Office over the disposition of the public lands is neither unlimited nor arbitrary, yet the question here presented as to whether or not the communication and order amounted to a protest, which we regard as exceedingly close, was one clearly within the power of the Commissioner to decide. To say that he was mistaken would require us to review a matter exclusively confided by law to his discretion and judgment. This proceeding will not admit of such a review.'

"The communications of Special Agent Hammer respecting this entry were made within the two years contemplated by said act of March 3, 1891, as was the communication of June 18, 1904, from the Commissioner to said agent. It is apparent that these communications resulted in the withholding of a patent; in other words, that the Commissioner regarded the right to that patent as dependent upon the outcome of the investigation which was to ensue. The subsequent decision of the Secretary that what was done within the two-year period constituted a protest against the patenting of the entry, was not arbitrary or capricious, but was based upon evidence; and the sufficiency of that evidence was for his and not our determination."

The writ of error is asked for under § 250 of the Judicial Code, which provides:

"SEC. 250. Any final judgment or decree of the court of appeals of the District of Columbia may be reëxamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

* * * * * * * * *

"Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or

scope of any power or duty of an officer of the United States is drawn in question."

The case therefore to be appealable to this court from the Court of Appeals of the District of Columbia must be one in which the validity of the authority exercised or the existence or scope of the authority of the officer named is drawn in question.

"Drawn in question" is a phrase long used in other statutes of the United States regulating appellate jurisdiction. It is found in § 709 of the Revised Statutes, governing appeals from state courts to this court. It is in the fifth section of the Circuit Court of Appeals Act of March 3, 1891 (26 Stat. 826, 828, c. 517). It is in the statute regulating territorial appeals, (March 3, 1885, 23 Stat. 443, c. 355). The meaning of this phrase has been the subject of frequent consideration in this court, and it is unnecessary to review the numerous cases in which it has been interpreted.

As we have said, it is in the Circuit Court of Appeals Act, which provides that cases may be brought directly to this court from the Circuit Court in which, among other things, the validity or construction of any treaty made under the authority of the United States is drawn in question. In *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430, in considering whether the provisions of a certain treaty were drawn in question, so far as the validity or construction thereof was concerned, with a view to the exercise of the appellate jurisdiction of this court, Mr. Chief Justice Fuller, delivering the opinion of the court, reviewed the cases in this court and stated as the conclusion of the matter that in order to involve the validity or construction of a treaty "some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted." In *Pettit* v. *Walshe*, 194 U. S. 205, 216, the construction of a

treaty was held to be drawn in question where the petition for a writ of *habeas corpus* and the warrant under which the accused was arrested referred to the treaty, and the court below proceeded on the ground that the determination of the questions involved in the case depended in part upon the meaning of certain provisions of that treaty, these provisions having been duly brought to the attention of the court. It has also been held that the validity of a statute of the United States or authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such law is denied and the denial forms the subject of direct inquiry in the case. *United States* v. *Lynch*, 137 U. S. 280; *Linford* v. *Ellison*, 155 U. S. 503; *Snow* v. *United States*, 118 U. S. 346, 353; *McLean* v. *R. R. Co.*, 203 U. S. 38.

In clause five of § 250, under consideration, the added ground of appeal is given if the existence or scope of any power or duty of an officer of the United States is drawn in question. Within the meaning of this statute, was any such validity or existence or scope of authority drawn in question? It appears that the petitioner contended that no protest was pending in the Department which could rightfully justify the withholding of the patent. The officers of the United States took issue upon this allegation, and the Court of Appeals decided that there was testimony before the Secretary authorizing the exercise of the discretion conferred by law to withhold the patent, and upon that ground affirmed the decision, refusing the writ. The case was therefore submitted and decided upon the issue whether the action of the Secretary was justified in the exercise of his lawful discretion because of the facts disclosed in the record. The petitioner did not challenge, nor did the court pass upon, the validity of any authority exercised under the United States, nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is

used in the statute, that is, brought forward and made a ground of decision. The statutes under which the officers of the United States acted were concededly valid, and the authority exerted was lawful and within the powers of the officers, if the facts justified their action. The petitioner's real attack upon the action of the Secretary and Commissioner was because the facts shown did not warrant the exercise of the power given by law. The decision of that issue, upon which it is clear the case turned, neither involved nor decided the questions which make the case appealable to this court under the fifth clause of § 250 of the Judicial Code.

It follows that the petition for writ of error must be denied.